92-1580

NO.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

COATS COMPANY,

Petitioner,

v.

SCOTT CANTRELL,

Respondent.

Petition for Writ of Certiorari to the Court of Appeals for the Twelfth District of Texas at Tyler

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner's right to due process of law was abridged when a Texas appellate court ignored the requirement of fundamental fairness implicit in the 14th Amendment Clause of the United States Constitution and developed through United States Supreme Court decisions.

II. Whether Petitioner's right to due process of law was abridged when a Texas appellate court transgressed the Texas Constitution, the Texas Government Code and the Texas rules of Appellate Procedure because only one justice participated in the decision, resulting in a clear, palpable violation of Petitioner's constitutional right that Petitioner cannot be deprived of property without due process of law as established by the United States Constitution.

LIST OF PARTIES

In the Application for Writ of Error in the supreme court of Texas, The Coats Company, a division of Hennessy Industries, Inc., a subsidiary of Danaher Corporation was the petitioner, and Scott Cantrell was the respondent.

In the proceeding in the Court of Appeals for the Twelfth Court of Appeals District in Tyler, Texas, The Coats Company was the respondent-appellee and Scott Cantrell was the petitioner-appellant.

In the trial court, The Coats Company, was the defendant, and Scott Cantrell was the plaintiff.

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PETITION FOR WRIT OF CERTIORARI

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The petitioner, The Coats Company, a division of Hennessy Industries, Inc., a subsidiary of Danaher Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the court of appeals for the Twelfth District of Texas at Tyler entered in this proceeding on March 31, 1992.

OPINIONS BELOW

The opinion of the court of appeals for the Twelfth District of Texas at Tyler which reversed and remanded the take nothing judgment against Cantrell, plaintiff in the case below, is reported at 829 S.W.2d 875 (Tex. App.–Tyler 1992) and appears as Appendix A to this petition. The findings of the jury and subsequent judgment of the trial court are unreported.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals for the Twelfth District of Texas at Tyler was entered on March 31, 1992. A Motion for Rehearing in the court of appeals was denied in June 18, 1992. An Application for Writ of Error to the supreme court of Texas was denied on October 21, 1992. The Motion for Rehearing in the supreme court of Texas was denied on December 2, 1992. This Application for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

UNITED STATES CONSTITUTION PROVISION INVOLVED

Amendment XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXAS CONSTITUTION PROVISION INVOLVED

Texas Constitution, Article V, § 6.

The state shall be divided into courts of appeals districts, with each district having a Chief Justice, two or more other Justices, and such other officials as may be provided by law. The Justices shall have the qualifications prescribed for Justices of the supreme court. The court of appeals may sit in sections as authorized by law. The concurrence of a majority of the judges sitting in a

section is necessary to decide a case. Said court of appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error. Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law.

STATUTORY PROVISION INVOLVED

Texas Government Code, § 22.216(l)

The Court of Appeals for the Twelfth Court of Appeals District consists of a chief justice and two justices.

Texas Government Code, § 22.222(a):

Each court of appeals may sit in panels of not fewer than three justices for the purpose of hearing cases.

Texas Government Code, § 22.222(c):

A majority of a panel constitutes a quorum for the transaction of business, and the occurrence of a majority of a panel is necessary for a decision.

Texas Rules of Appellate Procedure, rule 90(b):

Signing of Opinions. A majority of the justices participating in the decision of the case shall determine whether the opinion shall be signed by a justice or issued per curiam. the names of the justices participating in the decision shall be noted on all written opinions or orders handed down by a panel.

STATEMENT OF THE CASE

I. Federal Question Timely and Properly Raised

Coats prevailed at the trial court level. On appeal the case was reversed in favor of Cantrell and remanded for a new trial. As the prevailing party, Coats had no basis to raise either a constitutional or federal question in the briefs filed in the appellate court.

Coats made Application for Writ of Error to the Texas Supreme Court. That Writ of Error was denied. In the Application for Writ of Error to the Texas Supreme Court Coats asserted:

> "this unprecedented holding represents a significant change in the law of this state applicable to "discovery" of similar products, places an undue burden on a defendant, and requires the production of documents that would not and could not have made any difference in the final outcome. In addition, in order to reach its decision to misconstrue the holding in *Jampole* v. *Touchy*, the court of appeals completely and wholly ignored long standing case decisions of this Court, the appellate courts, as well as procedural rules regarding the preservation of the record for appellate review".

Petitioner's Application for Writ of Error to the Supreme Court of Texas at page 3 (July 20, 1992).

The record as a whole showed by clear intendment that a constitutional or federal question regarding due process was raised in that the court of appeals either totally ignored the record or failed to read the trial record. This inaction resulted in the

rendition of an arbitrary, capricious and unfair judicial determination which has required and will continue to require Coats to expend enormous sums of money and effort in a retrial, thereby depriving Coats of a significant property interest. The constitutional or federal question was raised again in Coats' Motion for Rehearing to the Texas Supreme Court. The Motion for Rehearing was denied.

This court has stated that no particular form of words or phrases is necessary to raise a federal question. *Green Bay, & M. Canal Co. v. Patten Paper Co.*, 172 U.S. 58 (1898). If the record as a whole showed by clear intendment that a constitutional or federal question was raised, it has been adequately presented. *Street v. New York*, 394 U.S. 576 (1969). Coats' assertion of undue burden raised a constitutional or federal question which was preserved.

In the alternative, Coats urges that if this Court concludes that the state court's decision rests on an independent nonfederal ground, the nonfederal ground is without any fair or substantial support. In *National Asso. for Advancement of Colored People v. State of Alabama, ex rel. Patterson*, 357 U.S. 449, 455 (1958) this Court re-emphasized that its jurisdiction is not defeated if the nonfederal ground relied on by the state court is "without any fair or substantial support."

It then becomes this Court's duty to ascertain, in order that constitutional guarantees may appropriately be enforced, whether the asserted nonfederal ground independently and adequately supports the judgment and/or if the judgment of the appellate court is without any fair or substantive support.

For these reasons the decision of the court of appeals and the Texas Supreme Court are reviewable by this Court.

II. Proceedings Below

This lawsuit was originally filed by Cantrell against Coats and Kelly Springfield Tire Company (hereinafter referred to as "Kelly") on December 10, 1987 in the 62nd Judicial District Court for Hopkins County, Texas. Cantrell sought to recover damages against Coats and Kelly for injuries sustained as a result of a tire explosion which occurred while he was using a Coats' 40.40A tire changer to mount, bead seat, and inflate an old tire onto a highly rusted and corroded rim. Cantrell alleged that Coats' was negligent and strictly liability for the manufacture, design, and sale of the tire changer and such was the proximate cause and/or producing cause of his injuries and damages. Coats denied liability for claims asserted by Cantrell. Kelly was non-suited by Cantrell on March 8, 1989 following discovery. Prior to trial, extensive discovery was undertaken and completed by all parties.

The case was tried before a jury of twelve (12) Hopkins County citizens commencing on May 9, 1989, through May 17, 1989. The jury returned a verdict against Cantrell and in favor of Coats on May 17, 1989. [See Appendix H]. On June 15, 1989, the Court entered a take nothing judgment against Cantrell based on the jury's verdict. [See Appendix I].

Cantrell appealed the trial court's judgment. On March 20, 1992, the court of appeals entered an opinion and judgment reversing the trial court's judgment in favor of Coats signed only by Justice Bill Bass. [See Appendices A and B, respectively]. The court of appeals remanded the case to the trial court for a new trial. On April 16, 1992, Coats filed a Motion for Rehearing, asserting that the court of appeals erred in reversing and remanding the case to the trial court. On June 18, 1992, the clerk of the court of appeals notified counsel of record that the Motion for Rehearing had been overruled presumably bh Justice Bill Bass on June 18, 1992. [See Appendix C].

Coats submitted an Application for Writ of Error to the Texas Supreme Court which was denied. [See Appendix D]. Thereafter, a timely filed Motion for Rehearing was denied on December 2, 1992. [See Appendix E].

III. Material Facts

The dispute presented centers upon a legally correct and appropriate discretionary discovery ruling by the trial court judge and the failure of the Texas appellate court to follow well established procedural rules regarding the consideration of and the rendition of appellate decisions.

During the course of discovery more than twenty-five (25) depositions were taken of fact witnesses, expert witnesses, and Coats' personnel. In addition, Coats produced a large volume of written documentation as well as other information related to its efforts to develop safety devices to control the flow of air during the mounting, seating, and inflating of vehicular tires.

As this case moved closer to trial, Coats filed a motion for protective order which was legally sufficient and supported by appropriate affidavits, and made an offer for an *in camera* inspection of documents. The motion for protective order raised a number of grounds of objections to discovery, including undue burden, harassment, lack of relevance, and various privileges. Cantrell was not prohibited from obtaining any discovery. The protective order merely set forth the specific categories of items that Coats was required to produce. The trial court, following submission of written memoranda and hearing oral argument of the parties, duly and thoughtfully considered the motion for protective order and thereafter entered a protective order. This order was entered thirty-two (32) days prior to the discovery cutoff and two (2) months prior to trial. The motion for protective order and the trial court's order are attached to this Petition as Appendix F and Appendix G, respectively. This action by the court came following over fifteen (15) months of active pretrial

discovery. The discovery record reflected that a number of different safety mechanisms were developed, tested, and even patented by Coats. Although many safety devices were considered, there was no evidence that Coats ever marketed any of its tire changers prior to 1983 with a device to reduce air pressure. The discovery record further indicated that Coats utilized and relied upon a written warning regarding over-inflation of tires for the safety of the operators.

In 1987, four (4) years after the manufacture of the machine in question, Coats commenced development of a device known as a pneumatic inflator. This device functioned by periodically monitoring internal tire pressure while allowing full pressure flow to the tire and then cutting off inflation when the tire reached a present maximum pressure.

After the initial development of the pneumatic inflator, further modifications were made and the device was field tested to insure that it was both mechanically reliable and commercially feasible. At the time of the trial, the pneumatic inflator was in the final stages of development and had not yet been produced for the marketplace in a model similar to the 40.40A. The pneumatic inflator was in fact patented within days of the commencement of the trial.

The court of appeals' opinion purportedly relies upon *Jampole v. Touche*, 673 S.W.2d 569 (Tex. 1984). The *Jampole* decision requires the production of safety devices where there exists other similar models in addition to the model at issue. *Jampole* has no application in this case because there were no similar models, Coats had never marketed any of its 40.40A type models with safety devices. and all other predecessor models were marketed without safety devices. Essentially, there was nothing for Coats to produce. Evidence of safety devices tested and considered generally by Coats were replete within the record.

The crux of the issue before the Texas appellate court was whether or not Cantrell is entitled to a new trial because Coats sought protection from excessive discovery requests and its motion for protective order was granted by the trial court after a full airing of all issues and in its inherent discretion.

Cantrell complains that the trial court's order precluded the discovery of other safety devices applicable to predecessor models. What Cantrell failed to disclose in his appeal, and the court of appeals failed to glean from the record, was that Coats did not market any of its 40.40A predecessor models with safety devices. In addition, although Cantrell acknowledged in his appeal the presence of such evidence of alternative safety devices at trial, the court of appeals overlooked the portion of the record where substantial evidence of safety devices which had been considered and tested, though not marketed, was made available during discovery and such devices were in fact, the subject of plaintiff's case in chief.

The trial was long, hard-fought, and fair to both parties. The jury in this case had the full benefit of the evidence that Coats had tested safety devices, had marketed the 40.40A and its precedessors without safety devices, and that from time to time tire explosions occurred from overinflation. Despite the potential prejudice created by such evidence, the jury declined to find Coats negligent, grossly negligent, or strictly liable. Additional evidence would have been cumulative and would not have changed the outcome.

In considering its verdict, the jury had available to it evidence of the total number of accidents which had occurred on all Coats' tire changers from approximately 1972 to 1989, evidence of a variety of safety devices considered by Coats' witnesses or proposed by the plaintiff's experts, as well as the testimony from Cantrell's own expert witness that the Coats' predecessor model tire changer that he owned, and used in testing, without any safety device to control the fow of air, was not defective. Despite

the presence of such evidence, the jury, nonetheless, found in favor of Coats and against Cantrell.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Special and important reasons justify the granting of the writ. The court of appeals has severely departed from the accepted and usual course of proceedings. Because of this, Coats asserts a violation of its property interest that is encompassed within the protection of the 14th Amendment. Coats has been deprived of property without due process of law by the decision of the Texas court of appeals [hereinafter "court of appeals" or "appellate court"].

A careful consideration of the following arguments will show that the court of appeals' decision is an unfair, arbitrary, and capricious judicial determination without any fair or substantive support. Furthermore, the decision was rendered through a procedure in violation of Texas law, which has cast shadows on the fairness, integrity and reputation of public judicial proceedings.

I.

IN CONFLICT WITH THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT AND UNITED STATES SUPREME COURT DECISIONS, THE BASIS OF THE COURT OF APPEALS' DECISION IGNORES THE REQUIREMENT OF FUNDAMENTAL FAIRNESS.

The court of appeals' decision in the instant case ignores the concept of due process of law that has been applied to the states through the 14th Amendment of the United States Constitution. The language of the opinion clearly suggests that the court either failed to read the record or ignored it. Further, the court of appeals relied in its decision upon a general principle of law that was factually inapplicable to this case.

These fundamental errors resulted in a substitution of the judgment of a single appellate justice, contrary to Texas law, for the judgment and for the discretion of the trial court and the decision of the jury. If the appellate court's decision is permitted to stand, then Coats must retry the case at enormous expense over an issue that had no effect on the jury verdict, and was harmless error, at best.

Due process represents the idea of fundamental fairness, the denial of which is shocking to the sense of justice. *Kinsella v. United States*, 361 U.S. 234 (1960). The fundamental concept of due process of law calls for such procedural protections as a particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471 (1972). In *Boddie v. State of Connecticut*, 401 U.S. 371 (1971) this Court explained due process by stating that a state's obligations are not simply generalized ones; rather the state owes to each individual that process of law which in light of values of a free society can be characterized as due.

In 1943, this Court explained that due process in a procedure affecting property interests must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case. *Anderson National Bank v. Luckett*, 321 U.S. 233 (1943). Using *Anderson* as a benchmark for procedural acceptability, the court of appeals' decision fails for lack of due process. No reasonable person can dispute the purpose of the procedure, or that the effect has been a taking of Coats' property; however, the denial of due process of law becomes evident when the circumstances affecting the proceeding are scrutinized.

In the trial court, Coats obtained a take nothing judgment. The appellate court reversed and remanded the case for a new trial because it found that the trial court abused its discretion in too narrowly restricting discovery. It is hard to conceive why the appellate court, with the benefit of an extensive record at hand,

could find that the trial court's pre-trial order constituted such a limitation of discovery and such an abuse of discretion as to result in a denial of Cantrell's rights; and that such an order was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the trial court, now requiring a new trial.

A cursory review of the record by the appellate court would have shown that Cantrell, in fact, enjoyed a wide latitude in the depth and breadth of discovery. The pre-trial order, which purportedly constituted the abuse of discretion, did nothing to limit the scope of discovery in this case. This pre-trial order actually compelled Coats to produce certain itemized categories of documents and things. The pre-trial order that Cantrell complained about specifically required Coats to produce:

> "(1) a prototype of both the pneumatic inflator and a computerized inflation device being developed by Coats; (2) the patent applications for the pneumatic inflator and the computer inflator; and (3) the name of the supplier and the cost of the safety devices used on the pneumatic inflator and the computer inflator."

This same order also required Coats to produce:

> " all parts lists, supplier lists, cost lists, claim files, expert reports, and the depositions of expert witnesses pertaining to 40.40A's manufactured from 1978, the time of their introduction, through 1983, the year in which the machine being used by Cantrell was manufactured."

A basic understanding by the appellate court of the trial court's order was essential to rendering an appropriate decision. Equally important was an understanding that: (1) the order did not contain any express limitations of discovery, (2) the order required production of documents and things, and (3) the order was entered on the eve of both the discovery cutoff date and the trial date.

Cantrell complained on appeal that he did not receive certain information regarding other safety devices applicable to other models. The appellate court focused on this complaint and agreed. However the record clearly showed: (1) that no safety devices were marketed with any of the predecessor models to the 40.40A; (2) that substantial evidence of safety devices considered and tested, but not marketed in this model or its predecessors had been presented; (3) that these safety devices were made available during discovery; and (4) that these safety devices were the subject of Cantrell's case in chief and the testimony of Cantrell's expert witness. The record specifically reflected that Cantrell had received the requested information pertaining to other alternatives prior to the entry of the trial court's order, to wit:

> a. A detailed history of safety devices or alternatives considered by Coats from the mid 1970s to the present;
>
> b. A definitive statement by Coats that as a practical matter, none of them (pressure limiting devices) were ever found to be effective;
>
> c. A definitive statement by Coats that efforts to develop an effective safety device were ongoing;
>
> d. A definitive statement by Coats that the pneumatic inflator was not available in 1987;

> e. A detailed statement by Coats as to its approach to safety measures to lessen the risk of a person being seriously injured due to an exploding tire on one of its machines. Essentially the use of safety measures in the form of pressure limiters has never been [Coats'] approach at all.

The appellate court relied on only one case, *Jampole v. Touchy*, 673 S.W.2d 569 (Tex. 1984), for its analysis. In *Jampole*, the trial court limited discovery of safety devices to one particular make and model. The Texas Supreme Court held that a production of safety devices is required of similar models when requested; however, unlike the situation in *Jampole* no similar models existed that were marketed with safety devices. All other models were predecessor models marketed without safety devices. The pre-trial order did nothing to preclude Cantrell from obtaining discovery of alternative safety devices. In fact, it specifically required the production of documents pertaining to two alternative safety devices, the pneumatic inflator and the compuuter inflator.

The record clearly shows abundant evidence was introduced at trial by Cantrell regarding safety devices that were tested and considered by Coats and those proposed as alternatives by his expert witnesses. Even Cantrell acknowledged evidence of alternative safety devices was introduced at trial without regard to whether such evidence pertained specifically to the 40.40A. The introduction of such evidence at trial completely contradicts Cantrell's contentions on appeal that the trial court's pretrial order limited discovery to the 40.40A.

The appellate court erred in its decision by its apparent reliance upon documents attached to Cantrell's motion for new trial that were not competent evidence, in direct contravention to well-established Texas law. These documents had not been properly before the trial court and had not been properly

preserved for appeal. Therefore, the court of appeals could not consider them in its review. Texas law mandates that documents not offered at trial nor included in a bill of exception do not constitute part of the record for appeal. *See, Zodiac Corp. v. General Electric Credit Corp.*, 566 S.W.2d 341, 347 (Tex. Civ. App.-Tyler 1978, no writ); *see also Johnson v. Li*, 762 S.W.2d 307, 308-310 (Tex. App.-Ft. Worth 1988, writ denied) (depositions not introduced at trial or presented on a bill of exception cannot be considered on appeal); *Giles v. Cardenas*, 697 S.W.2d 422, 426-427 (Tex. App.-San Antonio 1985, writ ref'd n.r.e.) (testimony not presented at trial cannot be considered on appeal); *Bibby v. Preston*, 555 S.W.2d 898, 902 (Tex. Civ. App.-Tyler 1977, no writ) (deed attached as exhibit to appellate record cannot be considered on appeal); *Nixon v. Royal Coach Inn of Houston*, 464 S.W.2d 900, 901 (Tex. Civ. App.-Houston [14th Dist.] 1971, no writ) (appendix included with appellate brief does not constitute part of the record on appeal).

The short published opinion of the appellate court clearly illustrates a violation of Coats' right to due process of law. The appellate court committed fundamental error by ignoring the trial record, substituting its judgment for the discretion of the trial judge on discovery issues, substituting its judgment for that of the fact finder, and relying upon legal authority which was factually inapplicable.

The appellate court's action was inappropriate to the nature of the case and in direct conflict with *Anderson*. The procedure followed by the appellate court substantially affected the fairness, integrity and reputation of the public judicial proceeding. The judgment of the court of appeals, based on these inappropriate procedures, should not be permitted to stand.

II.

IN DIRECT CONFLICT WITH THE TEXAS CONSTITUTION, THE TEXAS GOVERNMENT CODE, AND THE TEXAS RULES OF APPELLATE PROCEDURE, THE RECORD REFLECTS THAT ONLY ONE JUSTICE OF THE COURT OF APPEALS PARTICIPATED IN THE DECISION TO REVERSE AND REMAND THE JUDGMENT OF THE TRIAL COURT THEREBY ABRIDGING COATS' CONSTITUTIONAL RIGHT TO DUE PROCESS.

This Court has established guidelines for determining whether Coats' right to due process of law was abridged. This Court explained the detailed standards that govern a citizen's due process of law as follows:

> "Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Matthews v. Eldridge, 424 U.S. 319 (1976).

The specific dictates of due process call for a consideration of all three distinct factors. The private interest affected by the official action is readily ascertainable, as Coats has been and will continue to be deprived of property, by expending considerable sums of money to protect its interest.

Regarding the procedures used. The Texas Government Code requires that the twelfth court of appeals district be comprised of three (3) justices: a chief justice, and two (2) associate justices. Tex. Gov't. Code § 22.216(l). Safeguards are mandated by the

Texas Constitution and the Texas Government Code, requiring a concurrence of the majority of the justices for a legally valid decision. Tex. Const. art. V, § 6; Tex. Gov't Code, § 22.222(c). The rules governing Texas appellate procedure require all justices who participate in the decision to be noted on all written opinions or orders. Tex.R.App.P.Ann. r. 90(b) (Vernon 1992).

In the instant case only one justice of the appellate court was noted as participating in the decision. [See Appendices A and B]. However, this notation, indicating only a single appellate justice participated in the decision, clearly violates the Texas Constitution and the Texas Government Code.

A review of written and published decisions by this appellate court reflects a pattern of this violation. In 1992 these three elected appellate justices rendered approximately forty-two (42) written decisions. [See Appendix J]. Five of the forty-two decisions were *per curiam*. On thirty-five of the remaining thirty-seven cases only one single appaellate justice was noted as participating in the decision. Interestingly in the other two cases Chief Justice Ramey and Justice Bass and Colley all participated and so noted the opinion as required by Rule 90(b) of the Texas Rules of Appellate Procedure. The Coats' decision was one of these thirty-five cases.

Adherence to Texas law would not have added any extra burden to the appellate court. The Texas Constitution and the Texas legislature provide procedural safeguards to assure the public that decisions will be rendered by a majority of the justices setting through a fair and rational procedure lending integrity and credibility to the judicial system. The appellate decision a single justice is a violation by this court of appeals which greatly increased Coats' risk of an erroneous decision and the resulting deprivation of its property interest.

To paraphrase the court of appeals, "the failure to have a majority of the appellate court justices decide this case was

calculated to and in reasonable probability did result in an erroneous and legally insupportable decision." [See Appendix A]. The court of appeals' decision violates the property rights of Coats resulting in a denial of due process.

CONCLUSION

The Texas supreme court's denial of the Application for Writ of Error and the Motion for Rehearing allows the appellate court decision to pave the way for other courts to ignore fundamental principles of this Court and the concept of fundamental fairness in judicial proceedings. The court of appeals' decision sets a precedent that if a plaintiff loses, the appellate court is free to ignore the record, disregard legislative requirements, and otherwise search out reasons and ways to allow him to be heard again. Such methodology is grossly unfair to defendants such as Coats.

The decision of the court of appeals can only be characterized as arbitrary, capricious, erroneous, and void of any due process of law.

The decision is also in direct conflict with the fundamental principles established in our system of jurisprudence by the United States Constitution and decisions of this Court for the protection and enforcement of private rights. The decision of the court of appeals has not only deprived Coats of the right to due process of law, but has adversely affected the fairness, integrity and reputation of the Texas judiciary. The language of the opinion shows clearly that the decision was made without a review of the record, and without the requisite number of justices required by Texas law. Consequently, the decision was the product of a capricious exercise of power by a single appellate justice in violation of the Texas Constitution and the Texas Government Code.

Cantrell and Coats fought a fair, tough, and evenly matched battle in the trial court. The trial judge exercised appropriate legal discretion and followed the relevant legal concepts governing discovery. The trial judge correctly entered his discovery order. The court of appeals abridged Coats' right to due process by reversing the trial court.

This Court now has the opportunity to align the opinion of the court of appeals with its decisions, and to require adherence to procedural safeguards utilized in judicial administration to assure the fundamental fairness concept implicit in the due process clause of the 14th Amendment.

A writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Dated this 1st day of March, 1993.

Respectfully submitted,

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